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No. 85-920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENT INTERVENORS BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS; FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; AND TRANSPORT WORKERS UNION OF AMERICA

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QUESTION PRESENTED

Whether the court of appeals correctly held that the legislative veto provision in Subsection (f)(3) of Section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1552(f)(3), is severable from the remainder of Section 43 when the language and the legislative history of the Act demonstrate that the employee protection program established by Section 43 would have been enacted by Congress even in the absence of the legislative veto?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. The Court Of Appeals Correctly Concluded That It Had Jurisdiction Over This Appeal	2
II. The Court Of Appeals Recognized And Correctly Applied The Proper Standard For Determining Severability	3
A. The Court Of Appeals' Severability Analysis Follows Long-Standing Precedent	3
B. The Well-Established Severability Standards Applied By The Court Of Appeals In This Case Do Not Violate The Constitutional Doctrine Of Separation Of Powers	10
III. The Court Of Appeals Considered And Properly Weighed Evidence Of Congressional Intent	14
A. The Language And Structure Of The Statute Demonstrate That The Legislative Veto Provision Is Severable From The Remainder Of The Statute	15
B. The Legislative History Demonstrates That The Legislative Veto Provision Is Severable From The Remainder Of The Statute	17
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
CASES:	
Alaska Airlines, Inc. v. Donovan, 766 F.2d 1550 (D.C. Cir. 1985)	*passim*
American Federation of Government Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1980)	7
Brotherhood of Railway and Airline Clerks, et al v. Alaska Airlines, Inc., et al, No. A-947	3
Buckley v. Valeo, 424 U.S. 1 (1976)	4,8
Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932)	4,12
El Paso & Northeastern R. Co. v. Gutierrez, 215 U.S. 87 (1909)	3
EEOC v. Allstate Insurance Co., 467 U.S. 1432 (1984)	2
Heckler v. Edwards, 465 U.S. 870 (1984)	2
Gulf Oil Corp. v. Dyke, 734 F.2d 797 (T.E.C.A.), *cert. denied*, ____U.S.____, 105 S.Ct. 173 (1984)	5,8-9
Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983)	*passim*
McCorkle v. United States, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978)	13-14
McDonald v. Piedmont Aviation, 625 F.Supp. 762 (S.D.N.Y. 1986)	17
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	3,14
Regan v. Time, ____U.S.____, 104 S.Ct. 3262 (1984)	3,4
Sibbach v. Wilson, 312 U.S. 1 (1941)	12
Tilton v. Richardson, 403 U.S. 672 (1971)	3
TVA v. Hill, 437 U.S. 153 (1978)	10,11
United States v. Jackson, 390 U.S. 570 (1968)	13
STATUTES AND OTHER MATERIALS:	
Airline Deregulation Act, Section 43, 49 U.S.C. § 1552	*passim*
Subsection 43(a), 49 U.S.C. app. § 1552(a)	15,16
Subsection 43(b), 49 U.S.C. app. § 1552(b)	13,15,16, 17

	Page
Subsection 43(c), 49 U.S.C. app. § 1552(c)	13,16
Subsection 43(d), 49 U.S.C. app. § 1552(d)	12,16,17
Subsection 43(f), 49 U.S.C. app. § 1552(f)	12,16
Subsection 43(f)(1), 49 U.S.C. app. § 1552(f)(1)	16,17
Subsection 43(f)(3), 49 U.S.C. app. § 1552(f)(3)	*passim*
Subsection 43(h)(1), 49 U.S.C. app. § 1552(h)(1)	15
Subsection 43(h)(2), 49 U.S.C. app. § 1552(h)(2)	15
Subsection 43(h)(4), 49 U.S.C. app. § 1552(h)(4)	15
Endangered Species Act of 1973, 16 U.S.C. § 1531, *et seq.*	10
Federal Aviation Act, 49 U.S.C. app. § 1301	13
Milwaukee Railroad Restructuring Act, 45 U.S.C. § 901, *et seq.*	16
Northeast Rail Service Act of 1981, 45 U.S.C. § 797(b)	16
Railway Labor Act, 45 U.S.C. § 151, *et seq.*	1
Reorganization Act of 1977, 5 U.S.C. § 901, *et seq.*	2
Rock Island Transition and Employee Assistance Act, 45 U.S.C. § 1001, *et seq.*	16
H. Rep. 95-1211, 95th Cong., 2d Sess. 26 (1978)	6,18
H. Rep. 95-1779, 95th Cong., 2d Sess. 105 (1978)	7
S. Rep. 95-631, 95th Cong., 2d Sess. 113 (1978)	6,18-19
124 Cong. Rec. 38522 (1978) (statement of Rep. Anderson)	7
124 Cong. Rec. 38524 (1978) (statement of Rep. Mineta)	7
124 Cong. Rec. 38521-38525 (1978)	19
124 Cong. Rec. 5851 (daily ed. April 17, 1979)	19
124 Cong. Rec. 37416-37421 (daily ed. October 14, 1978)	19
129 Cong. Rec. H10578 (daily ed. Nov. 18, 1983)	12
28 U.S.C. § 1252	2

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This brief is respectfully submitted on behalf of respondent intervenors Brotherhood of Railway and Airline Clerks ("BRAC"); Flight Engineers' International Association ("FEIA"); International Association of Machinists and Aerospace Workers ("IAM"); and Transport Workers Union of America ("TWU") (collectively, "BRAC, *et al.*"). These labor organizations are the duly authorized representatives of the majority of airline employees working under collective bargaining agreements, and they represent their members in all matters involving wages, rules, and working conditions pursuant to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

SUMMARY OF ARGUMENT

The court of appeals recognized and properly applied the well-established standards for determining severability enunciated by this Court, and it correctly concluded that the unconstitutional legislative veto provision in Subsection 43(f)(3) of the Airline Deregulation Act is severable from the remainder of Section 43.

ARGUMENT

I. The Court Of Appeals Correctly Concluded That It Had Jurisdiction Over This Appeal.

In a footnote, petitioners suggest that the court of appeals lacked jurisdiction over this appeal and that an appeal of the district court's decision should have been brought directly to this Court pursuant to 28 US.C. § 1252. Brief of Petitioners 13, n.13. Under 28 U.S.C. § 1252, the Supreme Court has jurisdiction over appeals from district court decisions holding federal statutues unconstitutional in civil actions to which the government is a party. However, in *EEOC v. Allstate Insurance Co.*, 467 U.S. 1432 (1984), the Court dismissed for want of jurisdiction an appeal taken pursuant to 28 U.S.C. § 1252 from a district court decision holding inseverable the legislative veto provision in the Reorganization Act of 1977, 5 U.S.C. § 901, *et seq.*

Petitioners acknowledge that the Court refused to accept jurisdiction in *Allstate,* but contend that this case is distinguishable because it involves a challenge to a decision holding that an entire statute is unconstitutional. Brief for Petitioners 13, n.13. However, the decision of the district court in this case, like the decision of the district court in *Allstate,* raises a question of statutory construction, and the issue presented on appeal is "the severability *vel non* of the remainder of the section in which the legislative veto appears." *Alaska Airlines, Inc. v. Donovan,* 766 F.2d 1550, 1555 (D.C. Cir. 1985). *See also Heckler v. Edwards,* 465 U.S. 870 (1984). Indeed, in opposing BRAC's application for a stay of the

judgment pending direct appeal to this Court from the decision of the district court, petitioners argued that BRAC had failed to show that this Court would note probable jurisdiction. According to petitioners, the district court's decision "did nothing more than apply well-established principles of statutory construction to a particular provision of the Airline Deregulation Act . . . ." Appellee's Opposition to Appellant's Application for Stay of Order and Final Judgment of the United States District Court for the District of Columbia 2-3 (May 22, 1984). *Brotherhood of Railway and Airline Clerks, et al. v. Alaska Airlines, Inc., et al.*, No. A-947.

II. The Court Of Appeals Recognized And Correctly Applied The Proper Standard For Determining Severability.

Petitioners contend that the court of appeals adopted a standard for determining severability which "contravenes long-standing precedent" and which "violates the constitutionally-required separation of powers." Brief for Petitioners 14, 17. Contrary to petitioners' contention, the court of appeals recognized and correctly applied the well-established standards for determining severability set forth by this Court in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

A. The Court Of Appeals' Severability Analysis Follows Long-Standing Precedent.

The standards for determining whether an unconstitutional statutory provision is severable from the remainder of a statute are well established. "The cardinal principal of statutory construction is to save and not to destroy." *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion), quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). "[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *Regan v. Time*, ____ U.S. ____, 104 S. Ct. 3262, 3269, 82 L.Ed.2d 487, 497 (1984), quoting *El Paso & Northeastern R. Co. v. Gutierrez*, 215 U.S. 87, 96 (1909).

In *Chadha*, this Court held that an unconstitutional legislative veto provision is to be severed " '[u]nless it is evident that

the Legislature would not have enacted those provisions which are within its power, independently of that which is not." ' 462 U.S. at 931-932, quoting *Buckley v. Valeo,* 424 U.S. 1, 108 (1976), and *Champlin Refining Co. v. Corporation Commission,* 286 U.S. 210, 234 (1932). In addition, following well-established principles governing severability, the Court held that an invalid legislative veto provision is "presumed severable if what remains after severance 'is fully operative as law." ' 462 U.S. at 934, quoting *Champlin Refining,* 286 U.S. at 234. These principles were recently reiterated by the Court in *Regan v. Time, supra.* There the Court held that the question of "[w]hether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." 104 S. Ct. at 3269, 82 L.Ed.2d at 492.[1]

Petitioners concede, as they must, that the court of appeals recognized long-standing precedent governing the severability of invalid statutory provisions. *See* Brief for Petitioners 15. Indeed, at the outset of its discussion of severability, the court declared:

> Since it is, of course, a veto provision whose severability is in question, the severability analysis set forth in *Chadha* itself is particularly instructive for us.

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[1] Ironically, in support of their contention that the court of appeals' severability analysis contravenes long-standing precedent, petitioners have attempted to shift the burden of proof by subtly misstating the well-established standard for determining severability. *See* Brief for Petitioners 14-15. Under this Court's decision in *Chadha, an unconstitutional legislative veto provision is to be severed unless it is evident* that Congress would not have enacted the statute without the legislative veto. 462 U.S. at 931-932. In contrast, under the standard formulated by Petitioners, *the entire statute must fall if it appears* that Congress would not have enacted the statute without the legislative veto. Brief for Petitioners 15. This standard improperly shifts the burden to those seeking to preserve the statute by requiring them to demonstrate that Congress would have enacted the statute without the veto.

Alaska Airlines, Inc. v. Donovan, 766 F.2d 1550, 1559 (D.C. Cir. 1985) (Pet. App. 15a-16a). After quoting the principles of severability set forth in *Chadha*, the court of appeals again stated that "the analytical framework enunicated by *Chadha* applies to the severability issue which we are called upon to resolve." *Id.* (Pet. App. 16a-17a).

As the court of appeals observed, "*Chadha* presumes severability of the offensive provision if what remains after severance is fully operable as law." *Id.* at 1560 (Pet. App. 17a). The party arguing against severability must "demonstrate that Congress would not have enacted the provision without the severed portion." *Id.* (Pet. App. 17a). In view of this presumption, "severance lies unless it is 'evident' that what remains would not have been enacted." *Id.* (Pet. App. 17a-18a) (footnote omitted). Recognizing that statutory provisions are to be preserved whenever possible, the court of appeals framed the central question presented by this appeal as follows:

> Our charge is to save as much of the statute as we can consistent of course with the underlying legislative intent. Only if we conclude that Congress would not have included a provision absent the constitutionally flawed portion is that provision to fall.
>
> * * * *
>
> That is, "the question is not whether Congress would have enacted th[is] *exact* statute[] had it known at the time of enactment that the legislative veto provisions were invalid, but rather, whether Congress would have preferred th[is] statute[], after severance of the legislative veto provision[], to no statute[] at all."

Id. (Pet. App. 18a) (footnote omitted; brackets in original), quoting *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 804 (T.E.C.A.) (emphasis in original), *cert. denied*, ____U.S.____, 105 S. Ct. 173, 83 L.Ed.2d 108 (1984).

The court of appeals scrutunized the legislative history of the Airline Deregulation Act in order to determine whether the unconstitutional legislative veto provision in Subsection (f)(3)

should be severed from the remainder of Section 43. Based upon its careful analysis of the legislative history of the Act, the court concluded:

> [T]he evidence, in our view, positively indicates that Congress would have preferred the employee protection plan with the veto provision severed out to a deregulatory statute stripped of any employee protection plan.

Id. at 1561 (Pet. App. 19a). Both the Senate and the House bills included employee protection programs, and these provisions were viewed an an important feature of the proposed legislation. *See* S. Rep. 95-631, 95th Cong., 2d Sess. 113-114 (1978); H. Rep. 95-1211, 95th Cong., 2d Sess. 26 (1978). The court properly rejected petitioners' reliance on selected comments from the legislative history expressing uncertainty about the need for employee protection.

> These comments . . . do nothing to counter the evidence that Congress placed great importance on the existence of the employee protection plan as an integral part of a comprehensive deregulatory regime.

766 F.2d at 1562 (Pet. App. 23a). The court of appeals likewise rejected petitioners' reliance on a solitary comment by then-Representative Elliott Levitas of Georgia expressing approval of the legislative veto provision. "[T]his sole source [is] a thin reed for eviscerating an entire remedial system fashioned out of humane Congressional concern for adversely affected airline employees . . . ." *Id.* at 1563.

The court of appeals also considered, and found unpersuasive, "various items of circumstantial evidence" upon which petitioners relied to support their contention that the legislative veto provision was inseverable from the remainder of the statute. *Id.* (Pet. App. 24a). The court found it hardly surprising that only Section 43 of the Act contained a legislative veto provision. Section 43 was, for lack of a better term, the only regulatory provision in a deregulatory statute. As such, it was a "likely candidate for inclusion of a legislative veto device." *Id.* (Pet. App. 25a). In addition, the court of appeals

rejected the argument that the legislative veto was inseverable because the statute contained a unique combination of features, in addition to the legislative veto, which provided both a time limit for the promulgation of implementing regulations and a report and wait provision. As the court properly concluded, this circumstantial evidence failed to establish that Congress would have declined to enact an employee protection program without a legislative veto provision. *Id.* at 1563-1564 (Pet. App. 26a).

Finally, the court of appeals rejected petitioners' contention that the House agreed to accept the Senate's "novel" employee protection plan only with a significantly strengthened legislative veto provision. *Id.* at 1564-1665 (Pet. App. 26a-28a). The Conference Committee adopted the Senate's employee protection plan, which contained a legislative veto provision, and added a report and wait provision. Conference Report, H. Rep. No. 1779, 95th Cong., 2d Sess. 105 (1978). However, the Senate bill was perceived, at least by several Representatives, as providing less protection for airline employees than the House bill. *See, e.g.,* 124 Cong. Rec. 38, 522 (1978) (statement of Rep. Anderson); 124 Cong. Rec. 38, 524 (1978) (statement of Rep. Mineta). The court of appeals "found no evidence that the House's agreement to the Senate version of the protection plan was given in exchange for beefing up the veto device." 766 F.2d at 1565 (Pet. App. 27a-28a). Indeed, the court considered it unlikely that "a program offering less protection would have occasioned a call for even greater legislative control . . . ." *Id.* (Pet. App. 28a). *Cf. American Federation of Government Employees v. Pierce,* 697 F.2d 303 (D.C. Cir. 1980) (the legislative veto provision played a "critical role" in the compromise which emerged from the Conference Committee). Thus, the court of appeals found no indication in the legislative history that Congress would have declined to enact an employee protection program without a legislative veto provision.

> We fail to find satisfied here the exacting inseverability standard that it be "evident" that Congress would have preferred no employee protection program over the program passed by Congress shorn of its veto provision. Ample evidence persuades us

> that the employee protection program, whatever its merit, was deemed by Congress to be an important aspect of the Act. In contrast, there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan.

Id. (Pet. App. 28a).

The separate opinion of Judge Ginsburg, concurring in the judgment, further demonstrates that the court of appeals adhered to the severability standards set forth in *Chadha*. In Judge Ginsburg's view, this case presented only one genuine issue: "would Congress have preferred excision of the veto provision to demolition of the airline employee protective prescriptions." *Id.* (Pet. App. 29a). In full agreement with the court's judgment, Judge Ginsburg concluded:

> Deletion of the veto preserves section 43 and thereby gives effect to the dominant intent of Congress. A declaration of inseverability, tearing down the section in its entirety, would be far more destructive of the legislature's will.

Id., citing *Buckley v. Valeo*, 424 U.S. at 108-109.

Petitioners nevertheless argue that the court of appeals abandoned the severability standards enunciated by this Court and embraced "a radically different standard" for determining severability. Brief for Petitioners 15. This argument is premised principally upon the court of appeals' statement that petitioners had the burden of showing "'that Congress would have preferred no airline employee protection plan at all to the existing provision *sans* the veto provision.'" Brief for Petitioners 15-16, quoting 766 F.2d at 1561 (Pet. App. 19a). Contrary to petitioners' contention, this statement does not constitute a departure from well-established standards for determining severability.

Relying in part upon *Gulf Oil Corp. v. Dyke, supra*, the court of appeals posed the question presented by this case as "'whether Congress would have preferred th[is] statute[], after severance of the legislative veto provision[], to no statute [] at all.'" 766 F.2d at 1560 (Pet. App. 18a), quoting *Gulf Oil*

Corp., 734 F.2d at 804. There is no indication that the court of appeals intended this to be a departure from the well-established standards of severability set forth in *Chadha*. On the contrary, as the court of appeals repeatedly explained, an invalid statutory provision is to be severed from the remainder of the statute "unless it is 'evident' that what remains would not have been enacted.'" 766 F.2d at 1560 (Pet. App. 18a). *See also id.* at 1560 (Pet. App. 17a) (" the party arguing against severability [must] demonstrate that Congress would not have enacted the provision without the severed portion"); *id.* at 1561 (Pet. App. 19a) ("the airlines must show . . . that it is *evident* that Congress would not have passed the section had Congress known that the veto provision would disappear'); *id.* at 1561 (Pet. App. 19a) ("the evidence . . . positively indicates that Congress would have preferred the employee protection plan with the veto provision severed out to a deregulatory statute stripped of any employee protection plan").

Moreover, this statement accurately describes the issue presented in a severability case. A court which is confronted with the question of whether an unconstitutional statutory provision can be severed from the remainder of statute has only two alternatives: (1) it may sever the invalid statutory provision from the remainder of the statute, leaving the valid portion of the statute in effect, or (2) it may strike down the statute in its entirety. Based upon a review of the legislative history, the court must determine whether Congress would have preferred the remainder of the statute, without the legislative veto, to no statute at all. In this case, following a careful analysis of the legislative history, the court of appeals found that petitioners had failed to demonstrate that it was evident that Congress would have preferred no employee protection program at all. 766 F.2d at 1565 (Pet. App. 28a). This analysis neither ignored the dominant intent of Congress nor allowed the court to reformulate the statute to create a new law not contemplated by Congress.

In sum, the court of appeals recognized and properly applied the standards for determining severability set forth by

this Court in *Chadha,* and it correctly concluded that the unconstitutional legislative veto provision was severable from the remainder of the statute.

B. The Well-Established Severability Standards Applied By The Court Of Appeals In This Case Do Not Violate The Constitutional Doctrine Of Separation Of Powers

Petitioners advance a host of arguments in support of their contention that the "new" severability standard allegedly formulated by the court of appeals usurps the legislative function of Congress. None of petitioners' arguments has merit.

Relying on *TVA v. Hill,* 437 U.S. 153, 194-195 (1978), petitioners assert that "[o]nce a court has performed its singular duty of determining whether a particular statute contravenes the Constitution, it should stop." Brief for Petitioners 17-18. In *TVA v. Hill,* notwithstanding the near completion of the multimillion-dollar Tellico Dam, this Court held that completion of the dam would violate the Endangered Species Act of 1973, 16 U.S.C. § 1531, *et seq.* The Court rejected arguments that the dam should be completed regardless of the Act's provisions, noting that the Court's function is not to view the Act "reasonably" or to shape a remedy "that accords with some modicum of common sense and the public weal." 437 U.S. at 194.

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.
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> * * * *
>
> [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal."

Id. at 194-195.

The Court's decision in *TVA v. Hill* plainly offers no support for petitioners' argument that the court of appeals usurped the legislative function of Congress in this case. The Court examined the legislative history of the Endangered Species Act, and the result it reached was "in accord with congressional intent." *Id.* at 184, n.29. As the Court's analysis of the Act's legislative history made clear, "the result we reach today is wholly in accord with both the words of the statute and the intent of Congress." *Id.* at 184. Similarly, in this case the court of appeals, applying well-established standards for determining the severability of an unconstitutional legislative veto provision, properly sought to ascertain the dominant intent of Congress in determining whether the legislative veto provision should be severed from the remainder of the statute.

Petitioners next contend that "the responsibility for remedial legislative action should be left where it belongs—with the legislature." Brief for Petitioners 18. According to petitioners, if Congress wished to reinstate the statute, it was free to do so. *Id.* This argument is premised, at least in part, on indicia that "congressional preference would have been for a law other than that which would remain after severance . . . ." *Id.* However, there is no indication of any such preference in this case. As the court of appeals correctly concluded, "the evidence, in our view, positively indicates that Congress would have preferred the employee protection plan with the veto provision severed out . . . ." 766 F.2d at 1561 (Pet. App. 19a). Moreover, as petitioners themselves readily admit, this approach would require Congress to reconsider legislation which it has already enacted. *Id.* 18, n.18. Although petitioners deem this to be an acceptable burden for Congress to bear, there are nearly 200 statutory provisions containing legislative vetoes, and it is unreasonable to assume that Congress would be willing, or able, to assume responsibility for such a mammoth undertaking. *See Chadha,* 462 U.S. at 967 (White, J. dissenting).

Furthermore, Congress had an opportunity in this instance to take remedial legislative action, but chose not to do so.

Subsection 43(f)(3) provides that the Secretary shall not issue as final any rules or regulations concerning the employee protection program until 30 legislative days after their submission to the appropriate committees of Congress. 49 U.S.C. app. § 1552(f)(3). This "report and wait" requirement gives Congress an opportunity to review proposed regulations before they become effective and to pass legislation barring their effectiveness if the regulations are deemed objectionable. *See Chadha,* 462 U.S. at 935 n.9; *Sibbach v. Wilson,* 312 U.S. 1, 1415 (1941). Final regulations implementing the first right of hire provisions of Section 43(d) were submitted for review as required by the Act on November 18, 1983, and Congress took no remedial action. *See* 129 Cong. Rec. H10578 (daily ed. Nov. 18, 1983). If the employee protection program as implemented by the Secretary was objectionable, Congress would surely have passed some form of remedial legislation, thereby ensuring that the program was in compliance with congressional intent.

Petitioners also contend that the "court's intrusion into the legislative sphere was prompted by its eagerness to identify presumptions that would negate the need for probing assessment of legislative intent." Brief for Petitioners 21. In *Chadha* this Court specifically recognized that a statutory provision is "presumed severable if what remains after severance 'is fully operative as a law,' " and the Court found the legislative veto provision severable, in part, because the remainder of the statute "survive[d] as a workable administrative mechanism without the one-House veto." 462 U.S. at 935, quoting *Champlin Refining,* 286 U.S. at 234. Thus, as the court of appeals in this case recognized, "*Chadha* presumes severability of the offensive provision if what remains after severance is fully operable as law." 766 F.2d at 1560 (Pet. App. 17a). The court's adherence to that standard clearly does not trigger an "insurmountable severability standard" which obviates the need to ascertain whether Congress would have been satisfied with the remainder of the statute. *See* Brief for Petitioners 22.

Petitioners' argument that "the *Chadha* 'operability' presumption" is either wholly inapplicable to this case or is applicable only after legislative intent favoring severability has

been determined, is without merit. *See* Brief for Petitioners 22-23. The fact that a statute survives as a workable mechanism after severance of the invalid statutory provision is an obvious and important factor to be considered in determining whether "the legislature would have been satisfied with what remainded . . . ." *Champlin Refining,* 286 U.S. at 235. Moreover, the absence of a severability clause does not diminish the fact that what remains after severance is fully operable as law.[2]

Furthermore, unlike many other statutes containing an unconstitutional legislative veto provision, the statute in this case provides an eleborate congressional review procedure that allows congressional oversight in the absence of the legislative veto device. Section 43(f)(3), which authorizes the Secretary of Labor to issue regulations to effectuate the program, requires that such regulations be submitted to the House and Senate aviation oversight committees for review. 49 U.S.C. app. § 1552(f)(3). In addition, the financial assistance provisions of the program are "subject to such amounts as are provided in appropriation Acts . . . ." 49 U.S.C. app. § 1552(b),(c) (To date, the financial assistance provisions have not been funded by Congress). Thus, the statute provides a workable mechanism allowing congressional oversight of the employee protection program even in the absence of the legislative veto provision.

Petitioners advance two final arguments which merit only brief comment. Their assertion that there is a presumption of inseverability in this case is specious. *See* Petitioners' Brief 24, n.27. The authorities upon which petitioners rely do not establish that there is a recognized presumption of inseverability. *See Chadha,* 462 U.S. at 1014 (Rehnquist, J. dissenting); *McCorkle v. United States,* 559 F.2d 1258, 1261

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[2] It is unclear whether the severability clause in the Federal Aviation Act, 49 U.S.C. app. § 1301, is applicable to Section 43. 766 F.2d at 1560, n.7 (Pet. App. 16a, n.7). As a consequence, the court of appeals declined to "read any legislative intent into the absence of an additional severability clause specifically encompassing section 43." *Id.* In any event, the "ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States v. Jackson,* 390 U.S. 570, 585 n.27 (1968).

(4th Cir. 1977), *cert. denied,* 434 U.S. 1011 (1978). Even if there were, a presumption of inseverability has absolutely no application to this case.

Although petitioners apparently concede that the court of appeals had a duty "to save as much of the statute as [it] can," they nevertheless assert that the court of appeals' anaylsis contorts the statutory rules of construction by "preferring presumption formulas to a genuine search for legislative intent." *See* Brief for Petitioners 22, n.23, quoting *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937). However, as an examination of the court of appeals' decision discloses, the Court recognized and correctly applied established severability standards in determining that the legislative veto provision in Subsection (f)(3) was severable from the remainder of Section 43.

III. The Court Of Appeals Considered And Properly Weighed Evidence Of Congressional Intent.

Petitioners contend that the court of appeals concluded that the legislative veto provision in Subsection (f)(3) is severable from the remainder of Section 43 because it "wrongly disregarded dispositive evidence demonstrating inseverability." Brief for Petitioners 26. Purporting to apply "[t]he proper, traditional analysis of legislative intent," petitioners assert that the legislative veto provision is inseverable because Congress "would not have enacted the employee protection program in its current form without including the veto provision as an essential check on DOL's development of the program." *Id.* at 27-28.

However, as even a casual reading of the decision below discloses, the court of appeals carefully considered, and rejected, petitioners' arguments that Congress would have enacted a different employee protection program in the absence of the legislative veto provision. Moreover, the court of appeals did not disregard evidence allegedly supporting petitioners' contention that the legislative veto provision was inseverable from the remainder of the statute. On the contrary, based upon an examination of the Act and the legislative history, the court was persuaded that it was far from evident that Congress would not have enacted the employee protection program in the absence of the legislative veto.

A. The Language And Structure Of The Statute Demonstrate That The Legislative Veto Provision Is Severable From The Remainder Of The Statute.

Each of the arguments on which petitioners rely to support their contention that the legislative veto provision is inseverable were carefully weighed and soundly rejected by the court of appeals. *See* 766 F.2d at 1560, 1563-1564 (Pet. App. 18a-19a, 24a-26a). Thus, petitioners cannot legitimately claim that the "evidence" upon which they now rely was disregarded by the court. Moreover, as the language and structure of the statute make clear, the legislative veto provision was not so essential to the employee protection plan that it is inseverable from the remainder of the statute.

The employment protection program provides a comprehensive program of protection for employees of certificated airlines dislocated by deregulation. In order to be eligible for protection, an airline employee must have been employed by a certificated air carrier for at least four years at the time the Airline Deregulation Act was enacted. 49 U.S.C. app. § 1552(h)(1). Moreover, a "qualifying dislocation" must be the result of a bankruptcy or major contraction which occurs within ten years of the enactment of the Deregulation Act and which is in major part caused by the change in regulatory structure brought about by the Act. 49 U.S.C. app. § 1552(h)(2). The term "major contraction" is defined as "a reduction by at least 7½ percent of the total number of full-time employees of an air carrier within a 12-month period." 49 U.S.C. app. § 1552(h)(4).

Subject to such amounts as are appropriated by Congress, Subsection 43(b) provides for monthly assistance payments for a maximum of three years to airline employees who have been deprived of employment or have suffered a reduction in wages as a result of deregulation. 49 U.S.C. app. § 1552 (a), (b). Under Subsection 43(b), a protected employee receives monthly assistance payments in an amount computed by the Secretary of Labor who, after consultation with the Secretary of Transportation, "*shall*, by rule promulgate guidelines to be used by him in determining the amount of each monthly assistance payment to be made to a member of each craft and class of

protected employees, and what percentage of salary such payment shall constitute for each applicable class or craft of employees." 49 U.S.C. app. § 1552(b) (emphasis added). Subsection 43(c) provides for relocation assistance payments to reimburse employees forced to relocate in order to obtain other employment. 49 U.S.C. app. § 1552(a), (c). Under Subsection 43(c), eligible protected employees forced to relocate receive assistance payments in amounts "as determined by the Secretary." 49 U.S.C. app. § 1552(c).

Subsection 43(d) provides that a protected employee who is furloughed or terminated, other than for cause, during the ten year period following enactment of the Deregulation Act has a right of first hire by any other certificated air carrier hiring additional employees. 49 U.S.C. app. § 1552(d).[3] An air carrier which held a certificate at the time the Deregulation Act was enacted has a corresponding duty to hire protected employees. *Id.*

Under Subsection 43(f)(1) the Secretary of Labor is authorized to "issue, amend, and repeal such rules and regulations as may be necessary for the administration of [the employee protection program]." 49 U.S.C. app. § 1552(f)(1). Section 43(f)(3) provides that the Secretary shall not issue any rule or regulation concerning the employee protection program as final until thirty legislative days after it has been submitted to the Senate Committee on Commerce, Science, and Transportation and to the House Committee on Public Works and Transportation. 49 U.S.C. app. § 1552(f)(3). Section 43(f)(3) also provides that any final rule or regulation issued by the Secretary shall become effective sixty legislative days after its submission to Congress unless during that period either House adopts a resolution disapproving the rule or regulation. 49 U.S.C. app. § 1552(f)(3). This provision is, of course, a one-House legislative veto, which was declared unconstitutional by this Court in *Chadha*.

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[3] The right-to-first-hire provisions of the Act are similar to protections which Congress provided for dislocated railroad employees in the Milwaukee Railroad Restructing Act, 45 U.S.C. § 907, the Rock Island Transition and Employee Assistant Act, 45 U.S.C. § 1004, and the Northeast Rail Service Act of 1981, 45 U.S.C. § 797(b).

Section 43's employee protection provisions are fully operative without the legislative veto. Indeed, section 43(d) states, without any reference to implementing regulations, that "[e]ach air carrier hiring additional employees shall have a duty to hire such a [protected employee] before they hire any other person . . . ." 49 U.S.C. app. § 1552(d). Neither an employee's first right of hire nor a carrier's statutory duty to hire a protected employee, is dependent upon the issuance of regulations implementing the employee protection program. *See McDonald v. Piedmont Aviation,* 625 F.Supp. 762 (S.D.N.Y. 1986) ("the adoption of regulations is hardly necessary to the enforcement of Section 43").

In addition, although Subsection 43(b) requires the Secretary to issue rules and regulations implementing the financial assistance provisions of the statute, Section 43(f)(1) simply provides that "[t]he Secretary *may* issue, amend, and repeal such rules and regulations as may be necessary for the administration of this section." 49 U.S.C. app. § 1552(f)(1) (emphasis added). Accordingly, the Secretary is under no obligation to promulgate regulations implementing the statute's first right to hire provisions, which, if issued, would be subject to the legislative veto provision in Subsection 43(f)(3).

Thus, it is far from "evident" that Congress would have refused to enact the employee protection program without the legislative veto. On the contrary, the language and structure of the statute demonstrate that Congress did not regard the legislative veto provision to be so critical to the statute's hiring preference provisions as to be inseverable from the remainder of the statute.

B. The Legislative History Demonstrates That The Legislative Veto Provision Is Severable From The Remainder Of The Statute.

In enacting the Airline Deregulation Act, Congress was aware that the new regulatory scheme might have severe and extensive adverse effects on the industry's labor force. Indeed, the legislative history establishes beyond doubt that Congress considered the employee protection provisions in Section 43 to be of the utmost importance, and it strongly reinforces the court

of appeals' conclusion that the legislative veto provision is severable from the remainder of the statute.

The House and Senate bills which led to the Deregulation Act each contained provisions for the protection of employees, and concern that airline employees be guaranteed a measure of protection from the adverse effects of deregulation was repeatedly expressed by both Houses of Congress. Congress was particularly concerned about the adverse effects of deregulation upon experienced airline employees who had devoted their carriers to an industry which, after forty years of protective government regulation, was about to undergo dramatic change. *See* S. Rep. No. 631, 95th Cong., 2d Sess. 113-114 (1978); H. Rep. No. 1211, 95th Cong., 2d Sess. 26 (1978). The importance of the employee protection provisions in Section 43 is reflected in the following excerpts from the Senate Report:

> The theoretical possibility that a major reduction might occur in the labor force of one or more airlines is the primary source for the serious concern expressed about this bill by many airline employees and their labor representatives. The Committee felt that this concern should not be ignored and that careful consideration of the question of employee protection programs was warranted. The Committee concluded that the kind of employee dislocations that might occur as a result of the new regulatory structure should be dealt with by a statutory employee protection program, as has been done in certain cases in the past.
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> * * *
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> Airline employees have relied on the present regulatory system through their reliance on the conditions which have resulted from that system. They have relied directly in their decision to enter the industry and indirectly through their acceptance of compensation and work rules which have been negotiated within the context of the regulatory system and the job security it was thought to offer.
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> * * *

> The Committee believes that the Congress, on behalf of the American people, must insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority—the airline employees and their families who have relied on the present system.

S. Rep. No. 631, 95th Cong., 2d Sess. 113-114. In contrast, the legislative history contains only a single reference to the legislative veto provision, which states that Congress favored oversight of only the monthly assistance payments, and not the remaining employee protection provisions. *Id.* at 116.

The floor debate on the conference committee compromise reinforces the argument that the legislative veto provision is severable from the remainder of Section 43. When Senator Cannon introduced the bill, he did not even mention that it contained a legislative veto provision. 124 Cong. Rec. 5851 (daily ed. April 17, 1979). There was no reference at all to the legislative veto in the ensuing Senate debate. *Id.* at 5849-5885. Moreover, as the Senate debates on the Conference Report demonstrate, there was widespread support for the employee protection program. 124 Cong. Rec. 37416-37421 (daily ed. October 14, 1978). There was wide-spread support for the program during the House debate as well. *Id.* at 38521-38525. Indeed, Congressman Levitas was the only member of the House even to address the legislative veto provisions. *Id.* at 38524.

Thus, the legislative history makes it abundantly clear that passage of the employee protection program in its present form did not hinge upon inclusion of a legislative veto and that Congress would have enacted the program without the veto. Indeed, the legislative history strongly supports the conclusion that Congress would *not* have enacted the Deregulation Act itself in its present form *without* the employee protection program.

CONCLUSION

WHEREFORE, for the foregoing reasons, respondent intervenors respectfully submit that the decision of the court of appeals should be affirmed.

Respectfully submitted,

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